



February 11, 2022

VIA ECF

The Honorable Hildy Bowbeer
Magistrate Judge, District of Minnesota
United States District Court
316 N. Robert Street
St. Paul, MN 55101

**RE: *In re Pork Antitrust Litigation*, 0:18-cv-01776-JRT-HB
Letter Regarding Case Management Issues for
Direct Action Plaintiff Cases**

Dear Judge Bowbeer:

We write on behalf of the Direct Action Plaintiffs (“DAP”) in response to Your Honor’s instructions during the January 31, 2022 status conference directing counsel to “meet and confer to discuss further the logistics of the MDL DAPs’ proposal that Defendants answer a single exemplar complaint, provide a statement of defenses and affirmative defenses in response to each complaint, and delay full answers to individual complaints until a later time” and “to file a letter updating the Court as to the results of that discussion,” and related minute orders. (ECF Nos. 1162, 1176).

DAPs submit this letter to specifically address Defendants’ proposed language regarding motions to dismiss, as set forth in Section I, Paragraph 6 of Exhibit A to Defendants’ February 11, 2022 letter (ECF No. 1182-1), and in response to Defendants’ commentary about that proposal in their cover letter (ECF No. 1182).

DAPs object to the inclusion of Defendants’ proposed language, which the parties have not previously addressed in writing or orally with the Court. DAPs received Defendants’ proposed language in Paragraph 6 for the first time at approximately 6:00 pm Eastern Time on Thursday, February 10, 2022. Thus, DAPs had less than 24 hours to consider, coordinate, and react to Defendants’ proposed language before the Court’s deadline to file the report on the parties’ efforts to meet and confer. *See* ECF No. 1176. As Chief Judge Tunheim indicated at the February 4, 2022 status conference, issues concerning motions to dismiss as to the DAP complaints could be addressed at the next status conference. DAPs agree.

DAPs further object to Defendants’ proposal because it makes the provision of defenses/affirmative defenses contingent on events that may or may not occur (e.g., the filing of amended complaints), but if they do, may not occur or be resolved for many months, which would deprive DAPs the full opportunity to take discovery



concerning Defendants' defenses/affirmative defenses before the current fact discovery deadline of September 1, 2022.

Under Defendants' proposal, Defendants need not file any motion to dismiss as to any DAP complaint except the exemplar *Associated Grocers* complaint, and any decision on the motion to dismiss that complaint would "apply equally" to all other DAP complaints, regardless of any substantive differences between the DAP complaints. ECF 1182-1, at p. 4. If the Defendants believe the DAP complaints are so similar (as they have argued in support of their proposal for a consolidated amended DAP complaint), then any motion to dismiss can be easily drafted to cover any DAP complaint against which Defendants move to dismiss—all Defendants would need to do is identify the DAP complaints subject to the motion to dismiss. This is done all the time. *Cf.* Jan. 31, 2022 Hr'g Tr. at 31:15-21 ("it's not at all unheard of, and we've done it in this and other cases, where the Court will order the parties to collaborate on a joint motion for summary judgment or a joint opposition, and then to file supplemental briefs to the extent there are individualized issues. So I don't know that that -- we can do that. We can handle that"). Moreover, if Defendants contend the DAP complaints are so different so as to require multiple separate motions to dismiss, then such differences underscore the substantive and procedural unfairness to DAPs of having any decision on the *Associate Grocers* complaint "apply equally" to every other DAP complaint.

DAPs respectfully suggest that all issues related to potential motions to dismiss be addressed after entry of the case management order.¹

The DAPs are available to discuss these issues further at the Court's convenience.

Respectfully submitted,

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¹ MDL DAPs do not concede the timeliness of any such motion, at least with respect to certain DAP complaints, and maintain their right to oppose any such motion on that basis.



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